IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 561

JOHNNY C. WILSON, ET AL., ETC., *Appellants*,

v.

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia, ET AL., ETC., *Appellees*.

On Appeal From the United States District Court for the Northern District of Georgia

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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I. Plaintiffs' (appellants') assertion, at page seven of the Jurisdictional Statement, that the Georgia Merit System's rules prohibit employment discrimination based only on religious, social or political affiliations[1] was based on Section 3.200[2] of these rules which is

[1] Referred to by defendants as a "glaring falsehood," Brief Supporting Motion to Affirm, 9.

[2] Both sections of the rules referred to herein appear in the Record at page 432 and again at page 1487.

captioned "Discriminations Due to Religious, Social or Political Affiliations." That section implements this prohibition by barring the asking of questions relating to these matters on the application form. This rule does not prohibit questioning, however, as to race.

Defendants (appellees), in reply to plaintiffs pointing out this omission, rely upon a quotation from paragraph 3.101 of the next preceding section, 3.100. The six paragraphs of this section deal at length with the captioned subject: "Prohibition of Political Activity." Plaintiffs' counsel were thus led by the caption and repeated references in the text into overlooking the seemingly unrelated clause prohibiting "discrimination in favor of, or against any applicant or employee because of race, color, sex, physical handicap, or national origin . . . ."[3]

But regardless of the rules, their existence, or even the existence of statutes prohibiting discrimination, cannot be relied upon to overcome the simple facts of racial discrimination. See *e.g., Pullum* v. *Greene,* 396 F.2d 251, 256-57 (5th Cir. 1968).

And the facts in this case speak for themselves and the first sentence of the questioned paragraph of the jurisdictional statement stands uncontroverted:

> Of the more than 850[4] persons employed by the state of Georgia in its correctional system, not

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[3] To merely be a Negro is not usually thought of as engaging in "political activity."

[4] In the printing of the brief this figure erroneously appeared as 50 and was subsequently corrected in pen and ink on the Court's copies.

more than thirteen are Negroes (the state population is 28.5% Negro (R. 19)); over half of these are at the boys' institution for juvenile offenders; and most of the rest are chaplains, part-time consultants, etc. (R. 1878-81).

II. Defendants' lengthy reliance on the often questioned[5] and partially overruled[6] case of *Twining* v. *New Jersey,* 211 U.S. 78 (1908), for the proposition that plaintiffs have no cause of action under the privileges and immunities clause of the fourteenth amendment is interesting. Plaintiffs extensively relied on the eighth and thirteenth amendments, and the due process and equal protection clauses of the fourteenth amendment. Defendants' almost exclusive attention to the privileges and immunities clause seems to indicate a tacit admission that there is no adequate answer to plaintiffs' primary constitutional assertions. On the other hand, if they are somehow suggesting that *Twining* is a limitation on the wartime amendments' creation of "an affirmative duty that the States eradicate all relics, 'badges and indicia of slavery' . . ." *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 873 (1966), *aff'd on reh. en banc* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967), then they are suggesting that there has been a severe retrogression in the interpretation of these amendments which calls for correction by this court.

And if "as a substitute for the Black Codes. . . . when racial discrimination herds men into ghettos . . .", it "is a relic of slavery," *Jones* v. *Alfred H. Mayer Co.,* 88 S. Ct. 2186, 2205 (1968); then the state's

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[5] See, *e.g.,* Tehan v. United States, 382 U.S. 406 (1965).

[6] See Malloy v. Hogan, 378 U.S. 1 (1964).

herding of men into Georgia's work camps, which are themselves a remnant of slavery, is a clear violation of the thirteenth amendment.

Respectfully submitted,

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